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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF OXNARD,

Plaintiff and Appellant,

v.

SEMPRA ENERGY et al.,

Defendants and Respondents.

2d Civil No. B260192
(Super. Ct. No. 56-2013-00439270-CU-BC-VTA)
(Ventura County)

This is a dispute between a public utility and a city over the cost of relocating gas lines to accommodate improvements in a state highway and public street interchange. The utility claims the city is responsible for paying 50 percent of the cost of the relocation. The city paid the utility under protest so that the project could be completed. The city seeks a refund from the utility. The trial court decided in favor of the utility. We reverse.

FACTS

An interchange between Highway 101 and Rice and Santa Clara Avenues lies within the City of Oxnard ("City"). To construct a new interchange, it was necessary to move two underground gas lines, a 30-inch line and an 8-inch line. The lines are owned by Sempra Energy and Southern California Gas Company (collectively "SoCal Gas").

Prior to its relocation, the 30-inch line crossed Highway 101 at Rice and Santa Clara Avenues and the 8-inch line was located within the Rice and Santa Clara Avenue overpass.

The new 30-inch line runs under the highway approximately 500 feet easterly of the old line. The new 8-inch line runs approximately 50 to 100 feet easterly of the old line. The highway portion of the land through which the new lines run is owned by the California Department of Transportation ("State"). The new lines also run through land within the jurisdiction of the City. SoCal Gas submitted the plans for the new lines to the City and the City approved them.

SoCal Gas initially determined that it was responsible for 50 percent of the cost of relocating the lines, and the State was responsible for the other 50 percent. Later SoCal Gas claimed that it was responsible for 50 percent and the City was responsible for the other 50 percent. SoCal Gas refused to complete the relocation until the City paid its share.

The City paid SoCal Gas $2,587,278.22 under protest. That amount represents 50 percent of the cost of relocating the gas lines. SoCal Gas completed the relocation of the gas lines.

The City brought the instant action to recover the costs it paid to SoCal Gas. The City relied on the Franchise Agreement between the City and SoCal Gas's predecessor in interest. The Franchise Agreement was adopted as an ordinance on August 4, 1970.

FRANCHISE AGREEMENT

The Franchise Agreement allows SoCal Gas to lay and use pipes for the purpose of transmitting gas under, along, across or upon the streets of the City.

Section 7, paragraph (d) of the agreement requires SoCal Gas to "remove or relocate, without expense to the City, any facilities installed, used and maintained under this franchise if and when made necessary by any lawful change of grade, alignment or width of any public street, way, alley or place, including the construction of any subway or viaduct by the City . . . ."

SoCal Gas relies on the Master Agreement between the State and SoCal Gas and the Cooperative Agreement between the State and the City.

MASTER AGREEMENT

The Master Agreement governs the allocation of costs between SoCal Gas and the State when a freeway project requires the relocation of utilities. Except in circumstances not relevant here, the cost of relocation shall be borne equally between the State and SoCal Gas. The agreement is dated November 1, 2004.

COOPERATIVE AGREEMENT

The Cooperative Agreement between the State and the City governs the specific highway improvement project at issue here. It was entered into on December 31, 2006.

Under the caption "RECITALS," paragraph 2 provides, in part, "CITY desires State highway improvements . . . and is responsible for one hundred (100%) percent of all capital outlay and staffing costs . . . ."

Under the caption "CITY AGREES," section I, paragraph 1 provides, in part, "To fund one hundred (100%) percent of all preliminary and design engineering costs . . . ."

Paragraph 8 under "CITY AGREES" provides: "If any existing public and/or private utility facilities conflict with PROJECT construction or violate STATE's encroachment policy, CITY shall make all necessary arrangements with the owners of such facilities for their protection, relocation, or removal in accordance with STATE policy and procedure for those facilities located within the area that will be STATE's highway right of way on completion of PROJECT and in accordance with CITY policy and procedure for those facilities located outside of the area that will be within STATE's highway right of way on completion of project. Total costs of such protection, relocation or removal shall be in accordance with STATE policy and procedure. Total costs of such protection, relocation or removal shall also be in accordance with CITY policy and procedure."

Under the caption "IT IS MUTUALLY AGREED," section III, paragraph 10 provides, in part, "Nothing in the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not parties to this Agreement . . . ."

JUDGMENT

The parties made cross-motions for summary adjudication. The trial court ruled for SoCal Gas. The court reasoned that under the Cooperative Agreement, the City assumed the State's financial obligations. Under the Master Agreement, the State is obligated to pay 50 percent of the cost of relocating the gas lines. Thus, the City is obligated to pay 50 percent of the cost. After the trial court found for SoCal Gas, the City dismissed its action with prejudice to facilitate this appeal.

DISCUSSION

I

A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 324.)

Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc. § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by other inferences or evidence which raise a triable issue of fact. (*Ibid.*) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The moving party has the initial burden of showing that one or more elements of a cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Where the moving party has carried that burden, the burden shifts to the opposing party to show a triable issue of material fact. (*Ibid.*) Our review of the trial court's grant of the motion is de novo. (*Id.* at p. 767.)

II

SoCal Gas contends that the Franchise Agreement does not apply.

SoCal Gas points out that the Franchise Agreement governs relocation of gas lines "made necessary by any lawful change of grade, alignment or width of any public street, way, alley or place. . . ." SoCal Gas argues a state highway is not covered by the agreement.

But a state highway qualifies as a street, way or place by any reasonable definition of those terms. In fact, Streets and Highways Code section 682 expressly authorizes a city "to grant franchises authorizing the exercise of any privilege in, along, across, under, through, over, and upon any state highway, or portion thereof, within its boundaries . . . ."

SoCal Gas argues that if the Franchise Agreement is applicable it would have to yield to agreements authorized by Streets and Highways Code section 701 et seq. Section 701 et seq. allocates costs between the State and a utility when the State requires a utility to relocate any facility within the right of way of a freeway.

But the Franchise Agreement here absolves the City from any costs for relocating gas lines. There is no conflict with a statutory scheme allocating costs between the State and a utility. Whatever claims SoCal Gas may have against the State pursuant to section 701 et seq., it has no claim against the City.

III

The City contends the trial court erred in basing its decision on the Cooperative Agreement.

The Cooperative Agreement is between the City and the State. The trial court determined that pursuant to the Cooperative Agreement the City assumed the State's financial obligations.

The short answer is found in section III, paragraph 10 of the agreement. It provides, in part, "Nothing in the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not parties to this Agreement . . . ."

SoCal Gas is indisputably not a party to the Cooperative Agreement. Even if the Cooperative Agreement is construed to create a duty in the City to assume the State's financial obligation, the duty is solely to the State. SoCal Gas cannot exact money from the City based on the Cooperative Agreement. The money the City paid for the cost of relocating the gas lines must be returned.[1]

SoCal Gas relies on *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115, for the proposition that when a city acts pursuant to a cooperative agreement with the State, it assumes the obligations of the State. But *McGuire* states no such thing.

McGuire involved a petition for a writ of mandate to compel the City of Los Angeles to enter into a contract for the improvement of a public road designated as a state highway. The city refused to enter into the contract on the ground that it violated the Public Works Wage Rate Act of 1931. Petitioner argued that as a charter city, the city was not subject to the wage act. Our Supreme Court determined that, although the city would perform the work under a cooperative agreement with the state, it was in essence a state project. (*Southern California Roads Co. v. McGuire*, *supra*, 2 Cal.2d at p. 121.) The court concluded that as a state project it was subject to the wage act, and the city was justified in refusing to execute the contract.

SoCal Gas reads *McGuire* much too broadly. It stands for nothing more than when a charter city enters into a cooperative agreement with the state for a public works project, the city is subject to state laws governing wages. It does not stand for the proposition that the city assumes all of the state's financial obligations. In fact, in *McGuire*, the court pointed out that the project would be funded entirely by the state except for an amount furnished by the federal government through the state. (*Southern California Roads Co. v. McGuire*, *supra*, 2 Cal.2d at p. 121.) The city was assuming no financial obligations of the state.

[1] Because the State is not a party to this action, we need not, and should not, determine the rights of the parties, if any, with regard to the State. Nothing we say herein should be interpreted as indicating what those rights are.

SoCal Gas argues it is not unjustly enriched. It claims it is only obligated to pay 50 percent of the costs of relocating the gas lines; if the City is not obligated, then the State is. But SoCal Gas exacted 50 percent of the cost from the City, not the State. The City had no obligation to pay. Thus, as to the City, SoCal Gas was unjustly enriched.

The judgment is reversed. Costs are awarded to the City.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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Colantuono, Highsmith & Whatley, PC, Holly O. Whatley, Jon R. Di Cristina for Plaintiff and Appellant.

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